B. Condition VII Would Give Applicants' Advanced Services Affiliates A Pretext to Refuse To Comply With Section 251(c)

Condition VII is silent as to whether an Applicant's advanced services affiliate would be subject to regulation as an "incumbent LEC." SBC argued in a recent *ex parte* filing, however, that the advanced services affiliates permitted by Condition VII would *not* be subject to Section 251(c) and the other provisions of the Act applicable to incumbent LECs.[72] While SBC's claim is meritless, the ambiguity created by Condition VII would permit Applicants' advanced services affiliates to refuse to comply with Section 251(c), and would force competitive LECs to undertake the costly and time-consuming process of litigating this issue while Applicants enjoyed freedom from the requirements the Commission has recognized are a "cornerstone" of the Act. *Section 706 Order* ¶ 73.[73]

More specifically, according to SBC, a BOC's Section 272 affiliate is not itself a "Bell Operating Company" pursuant to the definition of that term in Section 3(4) of the Act, which provides that a "successor or assign" of a Bell Operating Company is also a BOC. SBC contends that an advanced services affiliate would therefore not be a "successor or assign" for purposes of the definition of "incumbent local exchange carrier" in Section 251(h)(1)(B)(ii). This reasoning is flawed in at least two fundamental respects.

First, there is no basis to presume (as SBC necessarily does) that Section 272 is a roadmap to attaining "competitive LEC" status. Indeed, nothing in that section, or in any other part of the Act, suggests that an incumbent LEC may evade the obligations of Section 251(c)

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[72] *See* Letter from Michael K. Kellogg, (Kellogg, Huber, *et al.*) to Christopher J. Wright, (FCC) CC Docket 98-141, (FCC June 25, 1999) ("SBC Data Affiliate *Ex Parte*").

[73] The centrality of Section 251(c) to the Act is apparent from the fact that it is one of two sections for which Congress prohibited regulatory forbearance. *See* 47 U.S.C. § 160(d).

merely by creating a separate affiliate. Second, even if (contrary to fact) SBC were correct that compliance with Section 272 would allow an advanced services affiliate to avoid incumbent LEC status, Condition VII would impose requirements that are dramatically weaker than Section 272. Applicants' data affiliates thus would fail even their own misguided test for "competitive LEC" status.[74]

1. Congress Did Not Intend Section 272 as the Measure of "Incumbent LEC" Status

The *Non-Accounting Safeguards Order*[75] recognized that Sections 251 and 272 have "different underlying purposes." *Id.* ¶ 205. Congress tailored the Section 272 requirements to reduce the risks that a BOC entering the interLATA market would use its market power over local exchange facilities to undermine competition. *See id.* ¶ 206. There is simply no basis to presume that the Section 272 requirements can – or that Congress intended them to – serve Section 251(c)'s separate purpose to "ensure that incumbent LECs do not discriminate in opening their bottleneck facilities to competitors." *Id.* ¶ 205.[76] Moreover, even to the extent that

[74] Of course, even if SBC were correct (as it is not) that an SBC/Ameritech advanced services affiliate could evade regulation as an incumbent LEC, such an affiliate nevertheless would be bound by the restrictions of Section 271(a). That section provides that "Neither a Bell operating company, *nor any affiliate of a Bell operating company*, may provide interLATA services except as provided in this section." 47 U.S.C. § 271(a) (emphasis added).

[75] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd. 21905 (1996).

[76] In addition, the Act lists different separation requirements for BOC affiliates engaged in manufacturing (Section 273) and electronic publishing (Section 274), and the Commission has made clear that each of these sections imposes independent and distinct obligations on BOCs entering those fields. The Commission has even gone so far as to hold that the phrase "operate independently" in Section 272(b)(1) should not be read to impose the same obligations as "operated independently" in Section 274(b). *See Non-Accounting Safeguards Order* ¶ 157. The Act therefore provides no basis to conclude that an incumbent LEC affiliate may be deemed a non-incumbent LEC under Section 251(h) by complying with only the separation requirements

(continued . . .)

Section 272 were pertinent to an affiliate's "incumbent LEC" status, that section was intended to permit a BOC to operate a separate affiliate only *after* a BOC had opened its local market to competition by fully satisfying the requirements of Section 271; neither SBC nor Ameritech has yet done so.[77]

SBC's argument hinges on its claim that because a Section 272 affiliate is not a "successor or assign" for purposes of Section 3(4), any entity that adheres to that section's requirements also would not be a "successor or assign" under Section 251(h). But the regulatory implications of an entity being deemed a "BOC" are dramatically different that those that flow from "incumbent LEC" status,[78] and SBC offers no grounds to presume that Congress intended the tests for "successor or assign" status to be identical under in these two very different sections of the Act. As the Commission recognized in its *Section 706 Order*, the phrase "successor or assign" is not capable of a single definition. Instead, a determination of its meaning "must be based on the facts of each case and the particular legal obligation which is at issue." *Section 706*

(. . . continued)
of Section 272.

[77] The SBC Data Affiliate *ex parte* offers a sheer *non sequitur* when it contends that because it can today market advanced services using the SBC brand, provide operations, installation and maintenance ("OI&M"), and engage in other activities on an unseparated basis, it should therefore be able to engage in these same activities using an advanced services affiliate that is regulated as a competitive LEC. *See Id.* at 4. AT&T agrees that SBC could today form an affiliate and use that entity to provide advanced services, but that fact is irrelevant to the status of that affiliate under Section 251(h). When SBC today conducts these activities on an integrated basis, it does so as an *incumbent LEC*. The act of forming an affiliate that fails to adhere to *even the requirements of Section 272* plainly is insufficient to permit SBC to evade Section 251(c) – and SBC offers no serious argument to the contrary.

[78] To take the most obvious example, the Act permits entities that are incumbent LECs, but which are not BOCs or BOC affiliates, to provide interLATA telecommunications originating within their regions without first satisfying the requirements of Section 271.

Order ¶ 104 n.202 (internal quotation omitted). The D.C. Circuit also has recognized that identical terms may have different meanings in different sections of the Act, depending on the purposes they serve.[79] SBC's attempt to mechanically apply the Act's definition of a "Bell Operating Company" to Section 251(h)'s standard for deeming an entity an incumbent LEC is wholly misguided.[80]

The Commission's interpretation of Section 251(h) must be based on the purposes of Sections 251(c) and 252 and on the legal obligations they impose. The core purpose of Sections 251(c) and 252 is to open the local exchange market to competition by mandating that incumbent LECs give competitive LECs nondiscriminatory access to their monopoly-controlled bottleneck local exchange networks. By receiving such open, nondiscriminatory access, competitive LECs can compete directly against the incumbent LEC in the local exchange and exchange access market using parts of the incumbent LEC's own network, either by using network elements or by reselling incumbent LEC services. The determination whether an incumbent LEC affiliate is sufficiently separated from an incumbent LEC so as not to be deemed

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[79] *See U S West Communications v. FCC*, 1999 WL 362834, at *3 (D.C. Cir. June 8, 1999) ("[A]lthough we normally attribute consistent meanings to statutory terms, '[i]dentical words may have different meanings where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different.'") (quoting *Weaver v. USIA*, 87 F.3d 1429, 1437 (D.C. Cir. 1996)).

[80] Even ignoring an SBC-Ameritech advanced services affiliate's status as a "successor or assign," the affiliate described in Condition VII would nonetheless be subject to incumbent LEC regulation as a "comparable" carrier under Section 251(h)(2). This provision does not require that an affiliate supplant an incumbent LEC for all, or even most, services before it becomes subject to incumbent LEC regulation. Indeed, such a formulation would allow Applicants to avoid Section 251(h)(2) altogether through the simple expedient of employing multiple affiliates, each providing its own local exchange or access services within its own service area. *See* Reply Comments of AT&T Corp., CC Docket No. 98-147, at 23-24 (FCC Oct. 16, 1998) ("AT&T 706 Reply Comments").

a "successor or assign" necessarily must focus on the impact particular separation requirements would have on the market-opening goals of Sections 251 and 252.

As the Commission already has found, there is no legal or technical basis to distinguish between local exchange or exchange access services and "advanced services," and the technologies used for advanced services are fully capable of transmitting voice communications. *Section 706 Order* ¶¶ 35-37, 40-44. Thus, the Commission's determination of the separation requirements necessary to ensure that an affiliate is sufficiently separate from an incumbent LEC to avoid being regulated as an incumbent LEC cannot rest on the fact that the affiliate provides advanced services rather than (or in addition to) other forms of local exchange and exchange access.

It is even clearer that an SBC-Ameritech advanced services affiliate must be deemed an "incumbent LEC" for purposes of the Act because those entities are *not* limited to providing solely "data" services, but can provide voice services as well. As shown above, Condition VII defines "Advanced Services" in a manner that would include VoIP and other voice services, and other portions of Condition VII seem to presume that these affiliates will be able to provide voice-grade services.[81] Applicants plainly may not evade their legal obligations as incumbent LECs merely by establishing an affiliate subject to the very limited requirements imposed by Condition VII. Indeed, if they could do so, then Applicants could move their most profitable customers to their affiliates, while neglecting to invest in and upgrade the public telephone network used by their other customers – and to which their competitors would have access

[81] For example, Paragraph 34(b) of the Proposed Conditions requires an affiliate to certify for line sharing purposes that it is not providing voice on a particular loop.

pursuant to Section 251(c).[82] The affiliates could, in effect, operate a shadow network, as there is nothing that would prevent these entities from building the only local loops serving new housing developments or office parks, or otherwise constructing their own "competitive LEC" network wholly-owned by Applicants, and operating in their own territory using Applicants' service marks. A central purpose of Section 251(h)'s "successor or assign" provision plainly is to bar an incumbent LEC from evading its obligations under Section 251(c) by foregoing local network investment (whether involving enhancements or expansion) in its own name, and instead leaving such investment to an affiliated entity acting as the incumbent LEC's alter ego.[83]

2. Condition VII is Significantly Less Stringent than Section 272

Even if SBC's attempt to use Section 272 as the measure of an affiliate's status as an incumbent LEC were not otherwise meritless, it is simply irrelevant. While the separate affiliate provisions of Condition VII are purportedly modeled on Section 272 of the Act, they are dramatically weaker than the structural separation requirements Congress imposed in that section.

Condition VII provides (¶ 27) that Applicants' advanced services affiliates will be subject to Sections 272(b), (c), (e) and (g), except to the extent those subsections are inconsistent with the provisions of that paragraph. Thus, at the outset, Condition VII announces exceptions to

[82] Many commenters in the *Section 706 NPRM*, including several state commissions, warned the Commission of this risk. *See* AT&T 706 Reply Comments at 21, 24-25 (citing comments by Florida and Indiana regulatory commissions and the staff of the Wisconsin state commission).

[83] AT&T discussed the separation requirements that would be necessary in order for an incumbent LEC affiliate to avoid regulation as an incumbent LEC in its comments and reply comments on the Section *706 NPRM*. Rather than burden the record by repeating all of those arguments here, AT&T hereby incorporates its comments and reply comments in that docket, in their entirety, into this pleading by reference. Comments of AT&T Corp., CC Docket No. 98-147 (FCC Sep. 25, 1998) ("AT&T 706 Comments"); AT&T 706 Reply Comments..

Section 272, and entirely omits Section 272(d), which requires BOCs to undergo detailed audits expressly designed to detect violations of the separation and nondiscrimination requirements of Section 272. Further, Condition VII merely requires (¶ 27) Applicants to comply with the selected portions of Section 272 "as interpreted by the Commission as of July 1, 1999," despite the pendency of both judicial review and reconsideration petitions that could substantially affect the relevant rules and orders.

In a critical omission, Condition VII also fails to include any provisions designed to ensure that a SBC-Ameritech advanced services affiliate actually complies with the portions of Section 272 that Condition VII incorporates. The records compiled in the six Section 271 application reviews the Commission has conducted to date, as well as in numerous state Section 271 proceedings, clearly demonstrate that the BOCs – including SBC and Ameritech – have openly defied the Commission's Section 272 Rules while nevertheless claiming to be in compliance with them. AT&T's comments in the *Section 706 NPRM* carefully document the BOCs' sorry history in this regard.[84] To take just one example, in Section 271 application after Section 271 application BOCs have openly refused to comply with the Commission's repeated rulings that they must fully disclose their dealings with their affiliates as mandated by Section 272(b)(5).[85] Despite this uncontroverted record, Condition VII would allow Applicants' advanced services affiliates to begin joint marketing, reserving collocation space, or transferring equipment without any assurance beyond Applicants' "paper promises" of compliance.

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[84] *See* AT&T 706 Comments at 11-17.

[85] The Commission should also note that the fact that the BOCs have refused to disclose this critical information makes it likely that many other abuses have gone undetected.

Operational independence. Section 272(b)(1) requires affiliates to "operate independently" of a BOC. The Commission's *Non-Accounting Safeguards Order* ruled that this provision imposes independent substantive requirements that, among other things, preclude a BOC and its Section 272 affiliate from "performing operating, installation, and maintenance functions" for each other's facilities. *Non-Accounting Safeguards Order* ¶ 158. That order went on to observe that

> allowing the same personnel to perform the operating, installation, and maintenance services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the opportunity for such substantial integration of operating functions as to preclude independent operation, in violation of section 272(b)(1). Regardless of whether the BOC or the section 272 affiliate were to provide such services, we agree with AT&T that allowing the same individuals to perform such core functions on the facilities of both entities would create substantial opportunities for improper cost allocation, in terms of both the personnel time spent in performing such functions and the equipment utilized. . . . Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services *would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors.*

Id. ¶ 163 (emphasis added).

Despite these unequivocal findings, Condition VII provides (¶ 27(b)) that "Any SBC/Ameritech incumbent LEC may provide operations, installation, and maintenance ('OI&M') services to any separate Advanced Services affiliate pursuant to a tariff or approved interconnection agreement." As the above-quoted provisions of the *Non-Accounting Safeguards Order* make clear, however, these safeguards are insufficient to prevent an affiliate from gaining superior access to the BOC's facilities. And any interconnection agreement negotiated between an affiliate and its sister company could not possibly be regarded as the product of arm's length negotiation, and would likely include "poison pills" intended to make it unacceptable to competitors. Also, an affiliate would be insensitive to the price it paid a BOC for OI&M,

whether that rate were contained in a tariff or an interconnection agreement.[86] Such arrangements would constitute left-pocket to right-pocket transactions for Applicants, and would present a classic opportunity for a price squeeze.[87]

In addition, Condition VII limits (¶ 27(b)) the disclosure obligations that would otherwise apply to Applicants under Section 272 by providing that "public disclosure of the governing interconnection agreement (including the prices, discounts, terms and conditions associated with that agreement) shall satisfy the disclosure requirements as applied to the separate Advanced Services affiliate for products and services provided pursuant to this agreement." This provision is far less demanding than Section 272, which requires that each *transaction* between a BOC and its affiliate be disclosed, not merely the agreement pursuant to which a transaction occurs.[88] The Condition's attempt to curtail the Section 272 safeguards in this fashion is wholly unreasonable – all the more so in light of the *Non-Accounting Safeguards Order*'s ruling that OI&M presents "inevitabl[e]" opportunities for abuse.

Joint marketing. Condition VII would authorize (¶ 27(b)) Applicants' advanced services affiliates to jointly market their services with a SBC/Ameritech local company, and is inadequate in numerous respects. First, the Condition permits an affiliate to "complet[e] orders for . . . local

[86] For the above reasons, the provisions of Condition VII that call for Applicants to negotiate an interconnection agreement with their advanced services affiliates (¶ 29(a)) provide no meaningful protection for nascent advanced services competition.

[87] In its recent SBC Data Affiliate *ex parte*, SBC contends that although the Commission's interpretation of Section 272 prohibits the sharing of OI&M, "no similar language is found in 251(h)." *Id.* at 2. This argument proves far too much, of course, as Section 251(h) does not specifically prohibit *any* sharing of resources, but rather offers a broad and flexible standard intended to promote the goals of Sections 251 and 252.

[88] Memorandum Op. and Order, *Application of BellSouth Corp. et al. for Provisions of in-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599, ¶¶ 332-37 (1999).

services" as well as advanced services, but does not require the affiliate to use the same interfaces and OSS to provision Applicants' local exchange services (or local services provided via resale or network elements) that are available to competitive LECs. Condition VII would therefore permit Applicants simply to move their local provisioning operations into their affiliate, and then argue that they had no obligation to make available to competitors the interfaces the affiliate used for pre-ordering and ordering local services.

Second, if the Proposed Conditions were approved, Applicants could attempt to evade their equal access and nondiscrimination obligations by shifting their local service provisioning to an "advanced services affiliate," and then contending that this affiliate is not subject to Section 251(g).[89] While AT&T believes that a BOC affiliate offering local exchange service within the BOC's own territory plainly cannot escape the equal access and nondiscrimination restrictions Congress enacted in order to curb BOC market power, some BOCs have suggested in the past that Section 251(g) is not applicable to their affiliates' operations.

Third, Condition VII also would authorize (¶ 27(a)) customer care "after the sale" as permissible "joint marketing." No reasonable construction of the term "marketing" includes post-sale activities. Dictionary definitions of "marketing" limit the term to "activity involved in the moving of goods from the producer to the consumer," and do not refer to activities that occur

[89] Applicants may not advert to Section 272(g) as a source of authority for their affiliates to escape the requirements of Section 251(g). While the Commission has ruled that BOCs may use an inbound telemarketing script that recommends their Section 272 affiliates' interLATA services, such marketing can occur only *after* a BOC obtains Section 271 relief, at which time its local market is presumptively irreversibly open to competition. Section 272(g) is merely a narrow exception to the broad nondiscrimination and equal access obligations Section 251(g) imposes.

after goods reach a purchaser's hands.[90] There is, moreover, no readily apparent limit to the scope of "customer care" that occurs "after the sale," and that phrasing invites abuses by arguably encompassing such post-sale contacts as service calls and other activities that cannot reasonably be deemed an element of "marketing" (and which are certainly not encompassed by Section 272(g)).

Finally, Condition VII would permit (¶ 27(d)) an advanced services affiliate to use SBC's or Ameritech's "name, trademarks, or service marks on an exclusive basis." The Commission has never ruled that a Section 272 affiliate may share a BOC's marks in this fashion. If such marks may be used at all, Section 272(c) would require that competing providers be permitted to utilize those marks on the same terms that they are provided to the Section 272 affiliate. At minimum, an affiliate should impute the value of licensing marks in calculating its costs, as otherwise regulated services could be forced to subsidize advanced services offerings. As the staff economists of the Federal Trade Commission ("FTC") stated in their comments on the *Section 706 NPRM*, if an advanced services affiliate were permitted to use a BOC's name or logo, the BOC will have an incentive to overinvest in building its reputation, "resulting in harmful effects in both the regulated and unregulated markets," because by doing so it "enhance[s] the reputation of both it and its affiliates."[91]

[90] Webster's New World Dictionary (1984).

[91] Comments of Staff of Bureau of Economics of Federal Trade Commission, CC Docket No. 98-147, at 4 (FCC Sept. 25, 1998). The FTC economists note further that such overinvestment in reputation amounts to improper cross subsidization, and "may be done in ways that are difficult for regulators to detect and prevent." *Id.*

Nondiscrimination. Various provisions of Condition VII also fall short of the nondiscrimination requirements of Sections 272(c) and 272(e). First, Condition VII (¶ 27(c)) provides that the

> overall functionality of any Advanced Services provided by the incumbent LEC in a state as of the Merger Closing Date may be provided to the separate Advanced Services affiliate on an exclusive basis within the state until 6 months after the affiliate has obtained all necessary approvals and authorizations to provide such services within the state.

As an initial matter, this provision is so vague that it can easily be abused. What constitutes the "overall functionality of any Advanced Services"? It is readily foreseeable that Applicants will argue (after their merger closes) that this subparagraph grants their affiliates exclusive access to all advanced services *equipment* during a six month period, including equipment that must be unbundled or used to provide a resold service pursuant to Section 251.

In all events, no reasonable interpretation of "exclusive" access to "overall functionality" can be squared with the requirements of the Act. Applicants will continue to have resale and unbundling obligations pursuant to Section 251(c), obligations that Section 10 makes clear the Commission may not waive or modify. Moreover, it would be utterly irrational to grant Applicants' affiliates an "exclusive" right to any part of their network or the functionality thereof as a "condition" for approval of the Applicants' merger, when SBC and Ameritech today must permit competitive LECs access to those same network elements on terms prescribed by the Act.

The combination of a right to "exclusive access" to "overall functionality" and Condition VII's provision (¶ 28) permitting Applicants to transfer equipment to their affiliates could, moreover, make it impossible for competitive LECs to provide advanced services to customers served from some of Applicants' end offices. In the event Applicants were allowed to transfer

DSLAMs – the equipment that allows voice and data streams to travel over the same loop and that are necessary for DSL service – to their affiliate in an end office in which no collocation space were available, then competitors would have no means to offer advanced services, because Condition VII does not permit competitive LECs to obtain equipped loops from Applicants' advanced services affiliate. This failing means that competitors would similarly be excluded in cases in which Applicants' advanced services affiliates were utilizing remote terminals.

Condition VII also would permit (¶ 28) Applicants to transfer certain equipment to their affiliates "on an exclusive basis" for a period running from July 1, 1999 until six months after the Commission issues a final order in its *UNE Remand Proceeding*.[92] This provision runs directly counter to the broad nondiscrimination requirement of Section 272(c)(1), which the *Non-Accounting Safeguards Order* held "extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate." *Id.* ¶ 218. Indeed, that order did not attempt to exhaustively define the scope of Section 272(c)(1) for fear that it would "unnecessarily limit the scope of this section's otherwise unqualified nondiscrimination requirement." *Id.* ¶ 216. By permitting Applicants to transfer a wide range of equipment to their affiliates on an exclusive basis, the Commission would both eviscerate Section 272(c) and open the door for wide-scale subsidization of the affiliate's operations by encouraging Applicants to buy as much equipment as possible during the "grace period" so that they can transfer it to their affiliate's operations. Moreover, Condition VII would virtually guarantee improper subsidization of the affiliate by allowing Applicants, not the market, to set the value of transferred facilities.

[92] Second Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, 1999 WL 221834 (1999) ("*UNE Remand Proceeding*").

In addition to allowing exclusive transfers of "Advanced Services Equipment," Condition VII appears to contemplate that such transfers would carry with them the right to use the collocation space in which such equipment is located, even in cases in which collocation space in a particular Applicants' office is exhausted.[93] The *Non-Accounting Safeguards Order* expressly cited collocation space as subject to the nondiscrimination requirements of Section 272(c). *Id.* ¶ 221. In addition, that Order held that that a BOC could not transfer any "unique facility" to its Section 272 affiliate, unless it ensured that the transfer took place in an "open and nondiscriminatory" manner, so that "unaffiliated entities have an equal opportunity to obtain ownership of this facility." *Id.* ¶ 218. Items such as DSLAMs and other equipment that are already installed in Applicants' central offices or remote terminals plainly are "unique facilities" in that no competitive LEC can hope to replicate them without extraordinary expense and effort. There is simply no reasoned basis to exempt transfers to advanced services affiliates from this rule.

Condition VII provides (¶ 28) that transfers of equipment other than items deemed a network element by 47 C.F.R. § 51.319, as that rule was in effect on January 24, 1999, will not cause an advanced services affiliate to be deemed a "Bell Operating Company." This provision also appears to be more limited than Section 272 in a crucial respect. The *Non-Accounting Safeguards Order* provided that the transfer of "any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)" would render a Section 272 affiliate a "Bell Operating Company" pursuant to Section 3(4). *Non-Accounting Safeguards Order* ¶ 309. The Condition's requirement, by referring only to the Commission's rules, fails to specify that any

[93] *See* AT&T 706 Comments at 71-91; AT&T 706 Reply Comments at 73-88.

transfer of equipment that has been deemed a network element by a *state commission* will also render an affiliate a BOC pursuant Section 3(4).

Sunset. Condition VII states (¶ 39(a)) that the advanced services affiliate provisions will sunset three years after the Merger Closing Date. This provision is far weaker than its Section 272 counterpart, Section 272(f), which provides for *potential* sunset in each state three years *after* the date a BOC receives Section 271 authorization in that state, but permits the FCC to extend Section 272's requirements indefinitely. Further, Section 272(e)'s nondiscrimination provisions are not subject to sunset at *any* time.

Moreover Condition VII sunsets in the event a court "determines that, as a result of one or more of the permitted activities between the incumbent LEC and the separate Advanced Services affiliate described in sub-paragraphs 27(a)-(e), the separate Advanced Services affiliate must be deemed a successor or assign of the incumbent BOC for the purposes of applying 47 U.S.C. § 153(4)(A)." Proposed Conditions ¶ 39(c). In the event of an adverse judicial ruling, this provision would permit Applicants to escape with essentially *no* advanced services conditions of any kind. There is no basis for this broad "escape clause."

C. Condition VII's "Transition Period" Measures Are Deeply Flawed

Condition VII would permit Applicants to provide advanced services without using an affiliate until the affiliate received the necessary state approvals. During this "transition period," Condition VII would establish requirements that seek to achieve the "functional equivalent" of an advanced services affiliate. These proposals, however, are deeply flawed.

The "limitations" imposed during the transition period are essentially meaningless. Condition VII provides (¶ 31(f)(2)) that "Customer orders for Advanced Services obtained by the incumbent LEC must be passed to the separate Advanced Services affiliate for processing," but provides no indication of what it means for an order to be "passed to" the affiliate. It is thus unclear if Condition VII contemplate a "warm transfer" of a potential customer during a telephone contact, electronic transmission of orders to the advanced services affiliate, or some other form of interaction. The key term "processing" is also undefined.

This "obligation" is even less clear in light of Paragraph 31(f)(4) of the Proposed Conditions, which requires that any order an affiliate receives for advanced services "shall be passed to the incumbent LEC, which shall provide Advanced Services to the SBC/Ameritech customer." Reading these provisions of Condition VII in concert appears to require that orders received by a SBC-Ameritech incumbent LEC must be "passed to" the affiliate; but orders received by the affiliate must be "passed to" the incumbent LEC. At bottom, the requirements of the transition period are so vague and unclear that they could not constrain Applicants' conduct in any fashion.

D. The Conditions' OSS Discount Provisions Are Inadequate

Condition VII would require Applicants to "provide a discount of 25 percent off of the recurring and nonrecurring charges (including of [sic] the Surrogate Line Sharing Charges, if applicable) that otherwise would be applicable for unbundled local loops used to provide Advanced Services in the same relevant geographic area" in the event Applicants failed to meet their commitments regarding pre-ordering and ordering OSS. Proposed Conditions ¶ 35. These penalties would apply,

> Until SBC/Ameritech has developed and deployed OSS options for pre-ordering and ordering xDSL and other Advanced Services in satisfaction of Paragraph 16 of these Conditions and the EDI interface specified in that sub-paragraph is used by the separate Advanced Services affiliate for pre-ordering and ordering a substantial majority of its

Advanced Services in the relevant geographic area.

Id.

The above provision is of no real value, because it would not impose any *ongoing* requirement on Applicants. If Applicants attained the required thresholds[94] in a particular state at any point in time, they will arguably thereafter be excused from providing the required discounts if they later fail to meet them. For example, Applicants' advanced services affiliate might use the specified OSS for 85 percent of their orders in a given state for one month (or less), but then began to send only 10 percent of its orders over those systems. Condition VII would allow Applicants to briefly comply with the required thresholds, and then modify their OSS interfaces or make other changes to disadvantage competitive LECs and defeat Condition VII's intent.

E. Applicants' Advanced Services Affiliate Should Not Automatically Be Regarded As Nondominant

Condition VII provides (¶ 36) that the "affiliate(s) required by this Section shall be regulated by the FCC as non-dominant carrier(s) with respect to the provision of Advanced Services." This provision is flawed in several respects.

Nondominant status is in no way conditioned on Applicants demonstrating compliance with – or even complying with – the requirements of Condition VII. As AT&T showed above, the separate affiliate provisions of Section 272, which are the basis for Condition VII, have to date been met with open defiance. It would be patently unreasonable simply to accept

[94] The thresholds required by this paragraph are simply an unspecified "substantial majority." Because Condition VII fails to provide any guidance, Applicants would presumably declare themselves fully compliant and cease providing OSS discounts as soon as their order volume reached 51 percent.

Applicants' paper promises that they will abide by Condition VII. Indeed, Condition VII also fails to provide that nondominant status may be revoked in the event Applicants are found to be noncompliant at some point in the future.

Although the Commission has found that Section 272 affiliates should be afforded nondominant status for in-region interLATA services, such affiliates will not be able to provide those services until *after* a BOC obtains Section 271 authority, and thus has proved that its local market is open to competition. There are simply no grounds to grant nondominant status to Applicants' advanced services affiliate operating within Applicants' own territory at a time when Applicants retain market power. As AT&T has shown, Section 272 is significantly more restrictive than Condition VII's advanced services affiliate requirements. In light of that fact, the Commission plainly may not grant nondominant status to an Applicant's advanced services affiliate prior to the time that it would accord that status to a Section 272 affiliate offering services originating in its BOC parent's territory.

Shared Transport (Condition VIII)

Condition VIII, which purports to require Applicants to offer shared transport in the Ameritech territories, also fails to create any pro-competitive benefit. Condition VIII is nothing more than a stop-gap that applies only until the Commission issues a decision in the *UNE Remand Proceeding*.[95] If the Commission re-affirms the need for local switching and transport as unbundled network elements, then Applicants will be bound to follow that determination, and

[95] Second Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, 1999 WL 221834 (1999) ("*UNE Remand Proceeding*").

the condition will provide no additional benefit. If, on the other hand, the Commission (mistakenly) finds that either "local switching or transport is not a UNE nationally or in specific geographic areas" (¶ 41), then the Condition evaporates once that order is final and non-appealable (*id.*), and it no longer provides any benefit whatsoever. As a result, Condition VIII is essentially meaningless. Ameritech long ago should have joined all other incumbent LECs and agreed to provide shared transport – its refusal was frivolous, and indeed in defiance of binding orders by numerous regulatory bodies, including this Commission. This merger condition effectively rewards Applicants with merger approval for finally discarding – on an interim basis that arises only under a particular set of circumstances – Ameritech's campaign against shared transport.

Moreover, and in all events, Applicants' offer of shared transport in the proposed merger condition would not provide pro-competitive benefits because competitive LECs could not readily use it in the form that Applicants are prepared to offer it. As with any network element, to use shared transport competitive LECs must have the ability to order it via nondiscriminatory access to OSS. As part of its refusal over the past three and half years to provide shared transport, Ameritech has never developed the appropriate OSS to order shared transport in conjunction with other network elements, which reduces even any minute pro-competitive benefits of the merger condition to zero.[96]

[96] Although the condition proposes an interim solution to this problem, *see* Proposed Conditions ¶¶ 41(a)-(c) (which in fact is the identical "rough justice" work-around that AT&T proposed over two years ago, but that Ameritech then refused to implement), that proposal is no longer useful, given the short duration of the merger condition and the time and expense competitive LECs would need to incur to implement their own systems to take advantage of this interim offer.

Offering of UNEs (Condition IX)

This Condition, which incorporates the so-called "commitments" made by SBC and Ameritech in response to the Supreme Court's *Iowa Utilities Board*[97] decision vacating 47 C.F.R. § 51.319,[98] essentially "requires" Applicants, for a period lasting no longer than a few months, to provide network elements under those terms and conditions in interconnection agreements to which they had previously chosen to adhere. Proposed Condition IX does not open Applicants' in-region markets to competition, but underscores their status as the gatekeepers of competition by perpetuating their ability to dictate the terms of entry, as explained below.

As a preliminary matter, any "benefits" purportedly offered by Condition IX are of extremely short duration. Both the SBC and Ameritech Letters tie the duration of the commitments (but ironically, not their substance), to their existing interconnection agreements with competitive LECs. Most of AT&T's interconnection agreements with Applicants expire later this year (*e.g.*, California – December 1999) or early next year (*e.g.*, Texas – January 2000). This is equally true of many other competitive LECs' agreements, for they were either arbitrated at about the same time as AT&T's agreements, or were formed through competitive LECs' exercise of their limited "pick and choose" rights available under the Eighth Circuit's since vacated construction of Section 252(i).[99]

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[97] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

[98] *See* Attachment D to Proposed Conditions; Letter, Barry K. Allen (Ameritech) to Lawrence E. Strickling (FCC) (Feb. 11, 1999) ("Ameritech Letter"); Letter, Dale Robertson and Sandy Kinney (SBC) to Lawrence E. Strickling (FCC) (Feb. 9, 1999) ("SBC Letter").

[99] SBC, for example, required all competitive LECs opting into its agreement with AT&T to
(continued . . .)

Because they are so short-lived, these commitments could not possibly be found to make a meaningful contribution to opening Applicants' in-region markets to competition. No competitive LEC could construct a business plan around commitments that will expire in a few months. Further, Condition IX and the commitments it purportedly incorporates offer, as a practical matter, no benefits that would not be available in their absence. Any other conclusion ignores the fact that under the existing interconnection agreements, the vacating of 47 C.F.R. § 51.319 could have no immediate consequences on their obligations to provide network elements under the terms and conditions set forth therein. Those agreements do not permit unilateral action by the incumbent LEC in response to changes of the law, but require further negotiation and dispute resolution – a process that would likely last for a period approximating the duration of Applicants' commitment.

Yet what is most disturbing about Condition IX is that it purports to allow Applicants to dictate the terms and conditions under which they will offer network elements, in contravention of their obligations under the Act, and to withdraw even those terms if competitive LECs seek to enforce those obligations. Ameritech's Letter states, for example, that it is intended to "maintain the status quo that existed prior" to the Supreme Court's January 25, 1999 decision in *Iowa Utilities Board*, and commits only to provide "those network elements that Ameritech provided before the Supreme Court's decision." Notwithstanding the plain terms of its interconnection agreements with other competitive LECs, and repeated orders of the Commission, state regulatory commissions,[100] and even the Eighth Circuit, however, Ameritech had refused to

(. . . continued)
adhere to that agreement's January 22, 2000 expiration date.

[100] *See, e.g.*, Order, *In the Matter of the Commission Investigation and Generic Proceeding on*
(continued . . .)

provide shared transport, or combinations of network elements.[101] Ameritech therefore carefully crafted its letter to exclude these obligations from its "commitment."[102] This leads to the absurd result that Applicants could cite their unlawful refusals to comply with their obligations to provide shared transport under their interconnection agreements as a defense to a claim that such conduct likewise violates the merger conditions.

(. . . continued)
Ameritech Indiana's Rates for Interconnection, Service Unbundled Elements, and Transport and Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes, Indiana Utility Regulatory Commission Cause No. 40611, at 47 (Ind. URC June 30, 1998) (requiring Ameritech to provide shared transport); Entry, PUCO Case No. 97-752-TP-ARB (Ohio PUC Feb. 20, 1997) (AT&T Arbitration Case); Second Entry on Rehearing, Case PUCO No. 96-922-TP-UNC (Ohio PUC Nov. 6, 1997) (ordering Ameritech to provide a cost study for network element combinations and the element known a shared transport, as defined by the FCC); Entry, PUCO Case No. 96-922-TP-UNC (Ohio PUC March 19, 1998) (same); Order on Rehearing, PUCO Case No. 96-922-TP-UNC (Ohio PUC Oct. 22, 1998) (same); Order, *In the Matter of the Petition of AT&T Communications of Michigan, Inc. For Arbitration To Establish An Interconnection Agreement with Ameritech Michigan MPSC and In the Matter of the Petition of Ameritech Michigan For Arbitration To Establish An Interconnection Agreement With AT&T Communications of Michigan, Inc.*, MPSC Case No. U-11151 and U-11152 (Consol.) (Mich. PSC Feb. 28, 1997) (requiring Ameritech to provide AT&T with common transport on a per minute of use basis); Order, *In the Matter, On the Commission's Own Motion, to Consider the Total Service Long Run Incremental Costs and To Determine the Prices of Unbundled Network Elements, Interconnection Services, Resold Services, and Basic Local Exchange Services For Ameritech Michigan*, MPSC Case No. U. 11280 (Mich. PSC July 14, 1997) (holding that "[t]o restrict inter-office transmission options in the matter proposed by Ameritech Michigan would be contrary to the competitive purposes and policies of the Michigan Telecommunications Act."); *Id.*, Order on Rehearing (Mich. PSC July 28, 1998) (Commission affirms previous ruling citing to both federal and state law); *Id.*, Second Order On Rehearing (Mich. PSC June 26, 1998) (Commission again reaffirms its position that Ameritech must provide common transport on a usage sensitive basis). To date, Ameritech has refused to comply with these, or any other order requiring it to provide shared transport.

[101] *See, e.g.*, Hearing Transcript, Case No. 96-327-CT-ACE/96-658-TP-ACE, at 7 (Ohio PUC Apr. 23, 1998) ("The shared transport order of the FCC is currently on appeal by Ameritech. We believe that the shared transport order is unlawful and we would not – or have no intention of complying with that order until its legality is finally determined.").

[102] Because Applicants' obligation to offer shared transport under Condition VIII does not become effective until the Merger Closing Date, it does not fill the shared transport loophole that exists in Condition IX.

Further, the Ameritech Letter states that if a competitive LEC attempts to "modify the status quo or request access to a UNE that Ameritech has not previously provide[d]" – *i.e.*, attempts to enforce its right under an existing interconnection agreement pertaining to shared transport or network element combinations – "Ameritech reserves its legal rights at such time with respect to such carrier." This reservation of rights is not limited to the disputed network element, but appears to allow Ameritech to claim that as a consequence of the vacating of 47 C.F.R. § 51.319, it may refuse to provide any network element, such as unbundled loops, notwithstanding its commitment as incorporated in Condition IX.[103]

In sum, Condition IX, and the commitments it incorporates achieve exactly what Applicants have intended: they "maintain the status quo" of no competition for residential and most business customers. Condition IX thus offers no benefits which could mitigate the harms caused by the proposed merger.

Compliance with Commission Pricing Rules (Condition X)

The Commission has previously and correctly recognized that pricing rules "are a critical component" of any process to open monopoly markets to competition. *Local Competition Order* ¶ 113. Far from reflecting the critical importance of prices, however, Condition X, which is the

[103] The SBC Letter contains language which may be to the same effect. That letter provides that "in the event other parties to our existing interconnection agreements attempt to invalidate these agreements based upon *Iowa Utilities Board*, we reserve the right to respond as appropriate without regard to this commitment." Thus, for example, SBC could claim that it may withdraw its commitment if and to the extent that AT&T challenges as inconsistent with the Act and the Supreme Court's decision the "glue charges" that it imposed following the Eighth Circuit's decision to vacate Commission Rule 51.315(b), 47 C.F.R. § 51.315(b), which prohibited it from separating network elements.

only one that purports to address this subject, epitomizes nearly everything that is wrong with the Proposed Conditions. Condition X (1) merely purports to require Applicants to comply with the obligations to which they are already subject under the Act; (2) does not require any finding of compliance with those obligations prior to consummation of the merger; (3) establishes no new or more efficient enforcement mechanisms; and (4) could be affirmatively harmful, because it could be misconstrued as suggesting that the Commission is satisfied with the prices offered by Applicants to date, and/or intends that all compliance issues involving prices may or should only be addressed to state commissions. Condition X has thus managed to do what AT&T had thought to be impossible: impose "commitments" related to pricing that are even less effective than the one included in the Commission's order approving the merger of Bell Atlantic and NYNEX.

By its terms, the language of Condition X makes explicit what is equally true of all other conditions as well: "This section does not impose on SBC/Ameritech any pricing requirements that the Commission does not impose on all incumbent LECs." This statement forecloses any finding that Condition X mitigates or even addresses any of the harms associated with the merger, or that it provides further assurance that applicants will open their in-region markets to competition. In stark contrast to conditions proposed by AT&T and others that would have required Applicants to establish specific, Commission-approved prices in advance, Condition X allows Applicants to consummate their merger without any Commission review of their prices, much less a Commission finding that such prices comply with the Act. Condition X does not require prompt compliance with the existing pricing rules as a precondition to the merger, and instead continues the status quo in which new entrants are subjected by Applicants to costly and time consuming litigation in order to obtain the prices mandated by the Act and the Commission's Rules.

By relying solely on post-merger compliance, Condition X ignores the Commission's experience gleaned from the pricing condition imposed in connection with the Commission's approval of the merger of Bell Atlantic and NYNEX. Like Condition X, the Bell Atlantic-NYNEX pricing condition relied upon post-merger compliance with the Commission's pricing rules for unbundled network elements. Rather than abide by that condition, Bell Atlantic has ignored it. By Bell Atlantic's own admission, the condition has not caused Bell Atlantic to alter a single rate.[104] Accordingly, AT&T and MCI filed formal Complaints before the Commission in November 1997. Those Complaints remain unresolved, confirming that conditions that are not complied with prior to the closing of a merger generate only more litigation, not competition.

Wholly apart from its misguided reliance on post-merger compliance, moreover, proposed Condition X appears to relegate enforcement of the Commission's pricing rules, and any merger order that would impose this Condition, to thirteen different state commissions in the first instance, and multiple federal courts thereafter. In this regard, Condition X manages to fall short of the very low bar established by the Bell Atlantic-NYNEX pricing condition, which at least held out the promise (thus far unrealized) of a single Commission proceeding to resolve at least the key, threshold disputes over pricing methodology. In contrast, Condition X provides only that if the Bureau notifies Applicants that it has "concerns" regarding compliance with the pricing rules, and those concerns are "unresolved," Applicants shall "present those unresolved

[104] *See, e.g.*, Motion to Dismiss of Bell Atlantic Corp., File No. E-98-05, at 8 (FCC Dec. 15, 1997); Brief of Bell Atlantic Corp., File No. E-98-05, at 5-6 (FCC March 13, 1998)

concerns to the appropriate state commission(s)."[105] Although the proposed condition goes on to state that Applicants "shall take all necessary steps to comply with the Commission's pricing rules," it appears to excuse Applicants from compliance if, to the extent and for as long as permitted by their state commissions. At a minimum, the condition leaves to multiple states commissions not only matters of timing, but also whether and how to address the Bureau's expressed concerns.

Given the cost, uncertainty and delay associated with having to litigate precisely the same issues in multiple proceedings, Condition X would be inadequate even if the Commission's pricing rules had been interpreted and applied faithfully and uniformly by state commissions (leaving room for the states to approve prices that reflected technological and geographical considerations particular to a state), as the Commission had hoped. *See Local Competition Order* ¶¶ 113-14. But experience has demonstrated that the states' interpretation and application of the Commission's pricing rules have been markedly divergent,[106] resulting in enormous and in some instances entry-foreclosing disparities in the prices for unbundled network elements that cannot remotely be explained by factual differences.[107] These divergences are likely to increase,

[105] Even if it were not so ineffectual, this process for expressing its "concerns" provides nothing that is not already available to the Commission, which has always had the right to express its views, such as by participating through amicus filings in local competition proceedings pending before state commissions and federal courts. *See Local Competition Order* ¶121.

[106] Supplemental Brief of AT&T, File No. E-98-05, at 22-25 (FCC Feb. 26, 1999); Supplemental Reply Brief of AT&T, File No. E-98-05, at 1-2, 7 & n.5 (FCC March 19, 1999); State Use of Forward-Looking Economic Cost Methodologies: Some Convergence in Principle, But Not in Practice (filed as an *ex parte* in CC Docket 96-98 on March 19, 1999).

[107] For example, the state commission-approved nonrecurring charges (excluding California) for migrating an SBC customer to local service provided by AT&T using an existing combination of SBC's unbundled network elements range from $5.00 (Missouri) to $256.90 (Oklahoma). In the Ameritech region, those charges range from $58.27 (Michigan) to $145.85 (Wisconsin).

at least in the near term, as incumbent LECs peddle throughout the nation their post-*Iowa Utilities Board* revisionist claims that the Commission intended its rules to provide incumbent local exchange monopolists and state regulatory commissions with almost unbounded "flexibility" to adopt "different methodologies," with the only constraint being that rates must not explicitly be based on book costs.[108]

In sum, Condition X would offer nothing that is not already available under existing law, and even falls short of what the Commission had previously required as a condition of approving other proposed mergers between regional monopolists. Indeed, although they pay lip service to its pricing rules, the failure of the Proposed Conditions to assign any meaningful role to the Commission in their enforcement strips them of any substance beyond the requirements that Applicants charge whatever prices are deemed appropriate by state regulatory commissions – an approach that was categorically and correctly rejected by the Commission in its *Local Competition Order*, and by the Supreme Court in *Iowa Utilities Board*.[109]

Carrier to Carrier Promotions (Condition XI)

Despite Applicants' claims to the contrary, the so-called "Carrier to Carrier Promotions" contained in Condition XI will do little to open Applicants' markets to competition. These "promotions" are facially discriminatory in violation of the Act, attempt improperly to dictate what vehicles competitors should use to enter the local market, and are easily manipulated by Applicants to destroy whatever value they might have. Rather than trying to micro-manage the

[108] Supplemental Brief of Bell Atlantic, File No. E-98-05, at 7-8 (FCC March 12, 1999).

[109] 119 S. Ct. at 730 n.6 ("[A] federal program administered by 50 independent agencies is surpassing strange.").

ways in which new entrants compete with Applicants, the Commission should ensure that Applicants, and incumbent LECs generally, are in full compliance with the market opening conditions of the Act and thereby allow market forces to determine what types of competition – and modes of entry – work best.

A. Condition XI Violates Several Independent Provisions Of The Act And The Commission's Implementing Regulations

Section 251(c)(3) of the Act strictly requires that incumbent LECs make unbundled elements available to "*any*" requesting carrier, "on rates, terms, and conditions that are just, reasonable, and *nondiscriminatory*." 47 U.S.C. § 251(c)(3) (emphasis added). The Commission has broadly interpreted this provision as requiring incumbent LECs to provide access to unbundled network elements on terms and conditions that are "offered *equally* to *all* requesting telecommunications carriers." 47 C.F.R. § 51.313(a) (emphasis added). *See also* 47 U.S.C. § 251(c)(4)(b) (prohibiting discriminatory conditions on resale); 47 C.F.R. § 51.603(a) (same). The carrier-to-carrier promotions, however, are facially discriminatory because they will not be "offered equally to all requesting carriers." Instead, they are limited to only a small fraction of Applicants' lines and will be available only on a first-come, first-serve basis.[110] Thus, the carriers that garner more of these scarce benefits than their rivals (or lock up the discounts altogether) will have a competitive advantage over those carriers.

In addition, the loop discounts discriminate both among users of network elements, and against carriers that do not use network elements at all. With respect to the former, the loop discounts discriminate against firms that want to use unbundled loops and switches in

[110] As explained below, the Condition would apply to approximately 12.4 percent of Applicants' residential lines and 7.5 percent of its total access lines.

combination. Those firms get loops at cost-based rates (or in some states, rates that include embedded costs as well), but have to compete against firms getting cheaper loops pursuant to the discount. With respect to the latter, these discounts also discriminate against firms that will be using their own loops and their own switches because those firms are making investment decisions based on forward-looking, economic costs, but they have to compete against firms that are paying less because the Commission has decided to subsidize their entry.

That the discounts may provide some competitive LECs with lower rates than they might otherwise be entitled to under the Act does not – and cannot – excuse such discrimination. The entire purpose of the Act's nondiscrimination provision is to ensure that all competitors are playing on a level playing field. As the Supreme Court recently observed in *American Tel. and Tel. Co. v. Central Office Tel., Inc.*, "[r]egardless of the carrier's motive – whether it seeks to benefit or harm a particular customer – the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that anti-discriminatory policy which lies at 'the heart of . . . the Communications Act.'"[111] 524 U.S. 214 (1998) (quoting *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994)). And the Commission has found that the nondiscrimination provisions of the 1996 Act are even "more stringent" than the prohibition against "'unjust and unreasonable' discrimination in section 202(a)" of the Communications Act of 1934. *Local Competition Order* ¶ 859.

[111] This discrimination is compounded by the fact that Condition XI contains no mechanism for fairly allocating how these limited discounts are parceled out. For example, could a single competitive LEC order on the first day of the Offering Window the maximum number of discounted loops available in each state? What happens if two carriers made such request? Does the incumbent LEC get to choose? These are not mere hypothetical questions, but are critical to how the discount program would be administered in practice.

Condition XI likewise violates Section 252(i) of the Act. That provision unambiguously states that incumbent LECs must provide "any interconnection service, or network element provided [pursuant to an interconnection agreement] to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions as those provided in the agreement*." 47 U.S.C. § 252(i) (emphasis added).[112] Thus, contrary to Condition XI, the Act expressly requires that if Applicants offer a discounted loop or the platform to one competitive LEC, they must make that same discounted loop or platform available to all other carriers that want it. Indeed, several state regulatory commissions have held that Section 252(i) forbids incumbent LECs from entering into special "side deals" and requires an incumbent LEC to provide network element combinations to all competitive LECs – even if it is not required by Section 251 of the Act – if that incumbent LEC offers network element combinations to any competitive LEC.[113]

The discriminatory nature of Condition XI is not simply limited to the numerical "caps" on the availability of the various promotional offerings. The limitations on the type of service that can be provided with the "promotional" loops and "end-to-end" combinations of network elements ("the platform") also violate numerous prior Commission constructions of the Act.

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[112] Section 252(i) plainly applies here as the terms of the Condition XI require Applicants to amend their interconnection agreements to incorporate the carrier-to-carrier promotions.

[113] *See, e.g.*, Order, *Approval of the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and the Other Phone Co. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*, Case No. 98-165 (Ky. PSC June 30, 1999); Order on Negotiated Interconnection Agreement, *Resale Agreement Between BellSouth Telecommunications, Inc. and the Other Phone Co.*, Docket No. P-55, SUB 1144 (N.C. PUC June 23, 1999).